Supreme Court of the United States

OCTOBER TERM, 1956

No. 743

JOHN ROBERT SHAW, AS EXECUTOR OF THE ESTATE OF ANTHONY ALMA RAHNER, DECEASED, PETITIONER,

versus

ATLANTIC COAST LINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY, RESPONDENTS

PETITION BY SOUTHERN RAILWAY COMPANY FOR A REHEARING

Your Petitioner, Southern Railway Company, respectfully prays for a rehearing herein upon the following grounds:

1. The decision of this Honorable Court, rendered on April 1, 1957, wherein the cause was remanded for trial against Southern Railway Company only, is apparently based upon this Court's decision in the case of *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 1 L. Ed. (2d) 508, 515, 77 S. Ct. ..... Since Respondents' brief in opposition to the granting of certiorari was due to be filed not later than March 2, 1957, and was mailed from Columbia, South Carolina, on February 28, 1957, within three days from the

time the decision in the case of *Rogers v. Missouri Pacific R. Co., supra,* was rendered, we had no notice of the decision and therefore no opportunity to distinguish the facts in that case from those in the case at bar. In fact the advance sheets reporting the *Rogers* opinion had not been published at the time Respondents' brief was filed. We think also that our case is more nearly like the case of *Herdman v. Pennsylvania R. Co.*, 352 U. S. ...., 1 L. Ed. (2d) 508, 515, 77 S. Ct. ...., in that here, as in the *Herdman case,* there were no unusual or extraordinary circumstances or occurrences. Mr. Rahner knew that trains might be expected to approach at any time from any direction; he knew that there was no urgency which required him to rush to the station; he was not caught in a trap, as Rogers was, but instead voluntarily ran in front of the train which killed him.

2. The facts in the *Rogers case* and those in the case at bar can be distinguished for the following reasons:

a. In the *Rogers case,* the plaintiff was in a position which he was forced to take in order to comply with his duty of checking the train for hot boxes and did nothing to bring about his own injury. In the case here, the deceased voluntarily placed himself in a position of danger, without instructions from anyone, he being in complete charge of the operation of his train at the station where he was injured. No one other than the deceased himself did anything to force him to cross the tracks in front of the oncoming train of whose approach he had had full warning.

b. In the *Rogers case,* there was a conflict of testimony as to whether the duties of the deceased demanded that he remain in a position of danger. In the case here, there was no such conflict; every witness, both those for the deceased and those for the defendants, testified that Mr. Rahner was under no duty to hurry in any manner.

c. There was no conflict in the testimony as to the view which Mr. Rahner had of the train at the time he started to cross the tracks. Without variation, each witness testified that from the time he reached a point twenty-five feet from the track on which the train was proceeding, he had an uninterrupted view of the train for more than a mile.

3. We respectfully contend that the case here should be decided upon the principles announced in *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U. S. 573, 95 L. Ed. 547, 71 S. Ct. 428; *Eckenrode v. Pennsylvania R. Co.*, 335 U. S. 329, 93 L. Ed. 41, 69 S. Ct. 91, and *Reynolds v. A. C. L. R. Co.*, 336 U. S. 207, 93 L. Ed. 618, 69 S. Ct. 507. The evidence in this case was all to one effect, and unless believed, there was no explanation as to why the injury occurred. The evidence plainly showed that there was no negligence on the part of the defendant railway which contributed in whole or in part to the unfortunate accident.

4. In addition to the above reasons for urging a rehearing, we are informed that the Court at this time has under consideration a petition for rehearing in the *Rogers case, supra,* and if the Court should reverse or modify that decision, it might well decide to do likewise here.

Respectfully submitted,

FRANK G. TOMPKINS, JR.,
Attorney for Petitioner, Southern Railway Company.

I, Frank G. Tompkins, Jr., Attorney for Petitioner, hereby certify that the within Petition for Rehearing is presented in good faith and is not intended for the purpose of delay.

FRANK G. TOMPKINS, JR.,
Attorney for Petitioner.